82 -120

Supreme Court, U.S.
FILED
JUN 16 1982
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GREYHOUND LINES, INC.,

Petitioner,

v.

TRAILWAYS, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT EHRENBARD
Counsel for Petitioner
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 463-8333

Of Counsel:
KELLEY DRYE & WARREN
WILLIAM C. BURT
MICHAEL A. BUTTERWORTH
ANDREW H. BART
RICHARD S. ORDER

Questions Presented for Review

1. Was the reversal by the District of Columbia Circuit of the award by the Interstate Commerce Commission of a certificate of public convenience and necessity to petitioner which conflicted (a) with a Fifth Circuit affirmance of such an award in a companion case involving the same parties and the same issues, (b) with a Third Circuit upholding of an award of much more significant authority involving the same principal protestant and, in more elaborate form, many of the same issues, (c) with a Seventh Circuit approval of the ICC's adoption of the entry policy applied in this instance and (d) with its own prior decision requiring the ICC to refrain from singling out petitioner for uniquely discriminatory treatment, erroneous or in excess of its authority?

2. Did the District of Columbia Circuit's reversal of an Interstate Commerce Commission order granting petitioner, Greyhound, "small" authority to pick up and discharge passengers at its rest stop in Little Rock, Arkansas because of the ICC's failure to make "an in-depth study of the competitive structure of the intercity bus market" sought on the strength of mere allegations of respondents, Trailways, Inc. or to use "broad legislative-type evidence" in an adjudicatory proceeding, constitute unwarranted judicial intrusion into administrative agency policy-making and discretion?

3. Was the District of Columbia Circuit, on review of an Interstate Commerce Commission order granting a certificate of authority, justified in finding that the ICC had "evaded" a full consideration of the "broad question of the long-term effects of incremental increases of [petitioner's] market share" (a) in the absence of proof either of such evasion or of such effects and (b) in the face of (i) another ICC order specifically deciding such consideration was inappropriate in this instance, (ii) a record showing that on the evidence properly before it the ICC's denominations were supported by substantial evi-

dence, and (iii) facts of which judicial notice can be taken showing the finding to be in error?

4. Did the District of Columbia Circuit go beyond the limits of judicial review in disallowing the application by the Interstate Commerce Commission of its well-settled and judicially approved burden of proof on protestants and its rules and procedures regarding official notice and timeliness for the submission of evidence in route application cases?

LIST OF PARTIES

All parties to the proceeding in the court whose judgment is sought to be reviewed are:

Trailways, Inc., American Buslines, Inc., Arkansas Motor Coaches, Ltd., Inc., Continental Bus System, Inc., Continental Panhandle Lines, Inc., Continental Southeastern Lines, Inc., Continental Southern Lines, Inc., Continental Tennessee Lines, Inc., Denver Colorado Springs Pueblo Motorway, Inc., Edwards Motor Transit Company, Midwest Buslines, Inc., Safeway Trails, Inc., Service Coach Lines, Inc., Tamiami Trail Tours, Inc., Trailways of New England, Inc., Union Bus Lines, Inc., and Virginia Stage Lines, Inc.,

Petitioners,

v.

Interstate Commerce Commission and United States of America,

Respondents,

Greyhound Lines, Inc., National Trailways Bus Systems,

Intervenors.

LISTING PURSUANT TO RULE 28.1

THE GREYHOUND CORPORATION
(Arizona)
Active Subsidiaries and Affiliates as of December 31, 1981

Parent-subsidiary or affiliate relationships are shown by marginal indentation. State, province or country of incorporation and ownership percentage are shown in parentheses following name, except that no ownership percentage appears for 100% owned subsidiaries. If ownership is divided between two affiliates, the ownership percentage of both is combined and is not in parentheses, and in such cases the company is listed as a subsidiary or affiliate of the company holding the highest percentage of stock. List does not include companies in which the aggregate direct and indirect interest of The Greyhound Corporation is less than 20%.

TRANSPORTATION AND BUS MANUFACTURING GROUPS

AMERICAN SIGHTSEEING TOURS, INC. (Florida)
Carey Transportation, Inc. (New York)
Gray Line New York Tours Corp. (New York)
GREYHOUND LINES, INC. (California)
- Atlantic Greyhound Lines of Virginia, Inc. (Virginia)
- California Parlor Car Tours Company (California)
- Greyhound Bus Depot of Atlanta, Inc. (Georgia) (87%)
- Greyhound de Mexico, S.A. de C.V. (Mexico)
- GREYHOUND LINES OF CANADA LTD. (Canada) (61%)
  - Brewster Transport Company Limited (Alberta)
    - Columbia Icefield Snowmobile Tours Ltd. (Alberta)
  - Coachways System Ltd. (Alberta)
    - Alaskan Coachways Limited (Alaska)
    - Canadian Coachways (Alberta) Limited (Alberta)
  - Eastern Canadian Greyhound Lines, Limited (Ontario)

MOTOR COACH INDUSTRIES LIMITED (Manitoba)*
Frank Fair Industries Ltd. (Manitoba)*
Greyhound-Taseco Saudi Arabia Ltd. (Saudi Arabia) (40%)
Greyhound World Tours, Inc. (Arizona)
Greyhound World Travel B.V. (Netherlands)
Greyhound World Travel A G (Switzerland)
Greyhound World Travel GmbH (Austria)
Greyhound World Travel GmbH (Germany)
Greyhound World Travel Limited (United Kingdom)
Greyhound World Travel S.A.R.L. (France)
Jefferson Lines Holding Company (Minnesota) (40%)
Jefferson Lines, Inc. (Minnesota)
Midland Lines, Inc. (Minnesota)
Kerrville Bus Company, Inc. (Texas) (40%)
Kerrville Tours, Inc. (Texas)
Painter Bus Lines, Inc. (Texas)
Union Bus Center of San Angelo, Inc. (Texas)

K.G. Lines, Inc. (Delaware) (50%)
New Mexico Transportation Company, Inc. (New Mexico)
Southeastern Stages, Inc. (Georgia) (40%)
Springfield Bus Terminal Corporation (Massachusetts) (32%)
Union Bus Station of Oklahoma City, Oklahoma (Oklahoma) (20%)
WGL Properties, Inc. (Delaware)
Wilmington Union Bus Station Corporation (North Carolina) (25%)
Greyhound Overseas Service Inc. (Arizona)*
MOTOR COACH INDUSTRIES, INC. (Delaware)*
Recreation Lines, Inc. (New York)
Red Top Sedan Service, Inc. (Florida)
Romex, Inc. (Delaware)*
Royal Hawaiian Tours, Limited (Hawaii)
Texas, New Mexico & Oklahoma Coaches, Inc. (Texas) (59%)
TRANSPORTATION MANUFACTURING CORPORATION (Delaware)*
UNIVERSAL COACH PARTS, INC. (Delaware)*

---

* Indicates a Bus Manufacturing Group Subsidiary

Vermont Transit Co., Inc. (Vermont)
Walters Transit Corp. (New York)

FOOD SERVICE GROUP

FABER ENTERPRISES, INC. (Delaware)
  Faber Tower Restaurants, Inc. (Illinois)
  O'Hare Drug Co., Inc. (Illinois)
GREYHOUND FOOD MANAGEMENT, INC. (Michigan)
  Glacier Park, Inc. (Arizona) (80%)
    Waterton Transport Company, Limited (Alberta)
  Greyhound Food Management of Texas Inc. (Texas) (49%)
  Restaura, GmbH (Germany) (75%)
  Restaura, S.A. (Belgium)
    Restauration Roger Lorent S.A. (Belgium)
GREYHOUND SUPPORT SERVICES, INC. (Delaware)
  GREYHOUND SERVICES SAUDI ARABIA LTD. (Saudi Arabia) (40%)
POST HOUSES, INC. (Delaware)

FOOD GROUP

ARMOUR AND COMPANY (Delaware)
  Armour Food Express Company (Delaware)
  Armour International Sales Corporation (Delaware)
  Tri-State Investment Company (Delaware) (27%)

CONSUMER PRODUCTS GROUP

ARMOUR-DIAL, INC. (Delaware)
  APC International Sales Corp. (Delaware)
  ARMOUR HANDCRAFTS, INC. (Arizona)
    Malina International Sales Corporation (Delaware)
  Ft. Madison Dial, Inc. (Iowa)
ARMOUR INTERNATIONAL COMPANY (Arizona)
  AIC International Sales Corporation (Arizona)
  Armour-Dial del Ecuador, S.A. (Ecuador)

Armour Foods (Benelux) N.V. (Belgium)
Armour Foods (Canada) Limited (Ontario)
Armour Foods (Deutschland) GmbH (Germany)
Carsten Moller Foods A.P.S. (Denmark) (50%)
Armour Foods (Italia) S.p.A. (Italy)
Armour Foods (U.K.) Ltd. (United Kingdom)
Armour Panama, S.A. (Panama)
Armour S.A.E. (Spain) (35%)
Dial Toiletries and Pharmaceuticals (Proprietary) Limited (South Africa)
Greyhound International Sales Corporation (Delaware)

FINANCIAL GROUP

GREYHOUND COMPUTER CORPORATION (Delaware)
D.S., Inc. (New Jersey)
EDP Marketing Corporation (New York)
Greyhound Computer de Mexico, S.A. de C.V. (Mexico)
Greyhound Computer of Canada Ltd. (Canada) (80%)
Canadian Computer Resources Limited (Canada)
Greyhound Computer Overseas Corporation (Delaware)
Greyhound Computer France S.A. (France)
Greyhound Computer S.A. (Switzerland)
Greyhound Computer Deutschland GmbH (Germany)
Greyhound Computer (U.K.) Limited (United Kingdom)
Greyhound Holdings Limited (United Kingdom)
PINE TOP INSURANCE COMPANY LIMITED (United Kingdom)
GREYHOUND LEASING & FINANCIAL CORPORATION (Delaware)
Boothe Leasing Corporation of Puerto Rico (Puerto Rico)
Bravo Aircraft Leasing, Inc. (Delaware)
Century Greyhound International & Financial Corporation (Japan) 35%
Century Greyhound International Finance Limited (Hong Kong)
Century Greyhound Leasing (Panama) S.A. (Panama)
(33 Panama Subsidiaries not listed individually)

Jacoby Shipping Corporation (Liberia)
Langdon Maritime Shipping, Inc. (Liberia)
Kasumigaseki Kosan Co., Ltd. (Japan) (70%)
Charlie Aircraft Leasing, Inc. (Delaware)
Echo Aircraft Leasing, Inc. (Delaware)
Financiera Greyhound, S.A. (Panama)
First Greyhound Leasing Company (Delaware)
Foxtrot Aircraft Leasing, Inc. (Delaware)
Golf Aircraft Leasing, Inc. (Delaware)
Greycas, Inc. (Arizona)
Greyhound Equipment Leasing Corporation (Delaware)
Greyhound Holding, A.G. (Switzerland)
Greyhound Financial & Leasing Corporation AG (Switzerland) 65%
Greyfin (Nassau) Limited (Bahama)
Greyfin Nederland Corporation B.V. (Netherlands)
Greyfin Services, Ltd. (United Kingdom)
Greyhound Equipment Finance, Ltd. (United Kingdom)
Elkra Investments Limited (United Kingdom)
Exosphere Limited (United Kingdom)
FEG Finance Ltd. (United Kingdom)
Greyhound Guaranty Limited (United Kingdom)
Greyhound Guarantee Nominees Ltd. (United Kingdom)
Secured Advances Ltd. (United Kingdom)
Greyhound Shipping Corporation (Liberia)
G.A.G. Corporation (Liberia)
GG Mortgagee Corp. (Liberia) (50%)
Greycal, Ltd. (Bahama)
Greyfin Corporation (Liberia)
Greyhound Inter-American Aircraft Leasing, Ltd. (Arizona)
Greyhound Leasing & Financial of Canada, Ltd. (Canada)
Greyhound Financial Inc. (Canada)
Vessel Finance Inc. (Delaware)
Greyhound Overseas Corporation N.V. (Netherlands Antilles)
Greyhound Real Estate Finance Corporation (Arizona)
Greyship Corp. (Delaware)
Hotel Aircraft Leasing, Inc. (Delaware)

Medbarge, Inc. (Delaware)
Nacional Arrendadora, S.A. de C.V. (Mexico)
Second Greyhound Leasing Company (Delaware)
Greyhound Realty Corporation (Arizona)
MCI Acceptance Corp. (Delaware)
Morga Investment Co. (Arizona)
VEREX CORPORATION (Arizona)
CMI Plaza Properties, Inc. (Wisconsin)
Liberty Mortgage Insurance Corporation (Wisconsin)
Management Data Systems, Inc. (Wisconsin)
Verex Assurance, Inc. (Wisconsin)
Commercial Mortgage Insurance, Inc. (Wisconsin)
Verex Indemnity Corporation (Wisconsin)
Verex MBC Funding Corporation (Wisconsin)
Verex Mortgage Corporation (Wisconsin)
Verex Relocation Services, Inc. (Wisconsin)
Verex Securities, Inc. (Wisconsin)
Verex Services, Inc. (Wisconsin)
Pine Top (Bermuda) Ltd. (Bermuda)
PINE TOP INSURANCE COMPANY (Illinois)
Pine Top Services Company (Arizona)
Pine Top Syndicate, Inc. (New York)
Pine Top Life Company (Arizona)
Shorrock Inc. (Maryland)
SHORROCK SECURITY SYSTEMS LIMITED (United Kingdom)
Shorrock Developments Ltd. (United Kingdom)
TRAVELERS EXPRESS COMPANY, INC. (Minnesota)
Travelers Express Co. (P.R.) Inc. (Puerto Rico)

SERVICES GROUP

Air Agency, Inc. (Florida)
Aircraft Service, Inc. (Florida)
AIRCRAFT SERVICE INTERNATIONAL, INC. (Delaware)
International Air Service of Puerto Rico, Inc. (Puerto Rico) (97%)

Bahamas Airport Services Limited (Bahama)
Freeport Flight Services Limited (Bahama) (80%)
Nassau Air Dispatch Service, Limited (Bahama) (80%)
DISPATCH SERVICES, INC. (Florida)
Florida Aviation Fueling Company, Inc. (Florida)
FLORIDA EXPORT TOBACCO CO. INC. (Florida)
Florida Export Warehouse Corp. (Florida)
Greyhound C&D, Inc. (Delaware)
CONSULTANTS & DESIGNERS INC. (Delaware)
Award Advertising Agency, Inc. (New York)
Canadian Consultants & Designers, Limited (Canada)
Canadian Design Service Co. Limited (Canada)
Consultants & Designers (U.K.) Limited (United Kingdom)
GREYHOUND EXHIBITGROUP INC. (Delaware)
Exhibitgroup (Canada) Ltd. (Canada)
Matrix Group, Inc. (Georgia)
GREYHOUND TEMPORARY PERSONNEL, INC. (New York)
Greyhound Permanent Personnel Inc. (New York)
GREYHOUND EXPOSITION SERVICES, INC. (Florida)
GREYHOUND RENT-A-CAR, INC. (Florida)
Greyhound Rent-A-Car of Orlando, Inc. (Florida) (49%)
International Cruise Shops, Inc. (Florida)
Las Vegas Convention Service Co. (Nevada)
Research Information Center, Inc. (Delaware)

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
List of Parties	iii
Listing Pursuant to Rule 28.1	iv
Table of Authorities	xiii
Reference to the Opinion Below	1
Statement of Grounds of Jurisdiction	2
Statutes and Regulatio s Involved	2
Statement of the Case	4
Reasons for Granting the Writ	7
Preliminary Statement	7
I. THE DISTRICT OF COLUMBIA CIRCUIT IS IN CONFLICT WITH THE OTHER CIRCUITS	10
II. THE DISTRICT OF COLUMBIA CIRCUIT HAS EXCEEDED THE BOUNDS OF PROPER JUDICIAL REVIEW AND HAS INTRUDED INTO AREAS PROPERLY COMMITTED TO AGENCY DISCRETION REGARDING COMPETITION, POLICY AND PROCEDURE	13
A. THE DISTRICT OF COLUMBIA CIRCUIT HAS INTRUDED INTO THE IMPLEMENTATION OF POLICY BY REGARDING MERE CLAIMS OF COMPETITIVE INJURY AS IMPOSING NEW DUTIES ON THE ICC	13
B. THE DISTRICT OF COLUMBIA CIRCUIT HAS IMPROPERLY ATTEMPTED TO REVERSE OR REVISE ICC POLICY CHOICES AS TO WHAT IS PRO-COMPETITIVE	16

PAGE

C. THE DISTRICT OF COLUMBIA CIRCUIT ENGAGED IN INAPPROPRIATE JUDICIAL REVIVAL OF SUPERSEDED ICC POLICIES AS TO BURDEN OF PROOF THAT LIMITED ENTRY AND RESTRICTED COMPETITION 19

D. THE DISTRICT OF COLUMBIA CIRCUIT IMPROPERLY INTRUDED INTO AGENCY PROCEDURE 21

1. Reversal for Agency Refusal to Accept Submissions Not in Accordance with Its Rules Was Unjustified 21

2. The District of Columbia Circuit, in its Instructions on Remand, Intruded into Areas of Agency Discretion as to Control of its Procedures 24

CONCLUSION 27

TABLE OF AUTHORITIES

PAGE

Cases

Assure Competitive Transp., Inc. v. United States, 635 F.2d 1301 (7th Cir. 1980) ("*Assure II*"). 8,11, 12,16,18

Assure Competitive Transp., Inc. v. United States, 629 F.2d 467 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981) ("*Assure I*"). 19,20

Capitol Bus Co. v. United States, No. 82-1380 (D.C. Cir., filed April 5, 1982). 8

Coastal Tank Lines, Inc., Extension-Neal, W.Va., 108 M.C.C. 190 (1968). 22

FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940). 22

FCC v. RCA Communications, Inc., 346 U.S. 86 (1953). 20

FCC v. Schreiber, 381 U.S. 279 (1965). 22

FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981). 7,12,13 16,18,19

Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979). 13

Greyhound Corp. v. ICC, 551 F.2d 414 (D.C. Cir. 1977); 668 F.2d 1354 (D.C. Cir. 1981). 8,12

Greyhound Lines, Inc., Extension-Ft. Collins, Co., No. MC-1515 (Sub. No. 306) (June 10, 1982). 8

Howard H. Krapf Extension-Cinders, 76 M.C.C. 103 (1958). 22

Howard Sober, Inc., Extension-Secondary Truckaway Minnesota, 88 M.C.C. 755 (1962). 22

Ligon Specialized Hauler, Inc. v. ICC, 587 F.2d 304 (6th Cir. 1978). 26

PAGE

May Trucking Co. v. United States, 593 F.2d 1349 (D.C. Cir. 1979). 19

North American Van Lines, Inc. v. United States, 412 F. Supp. 782 (N.D.Ind. 1976). 26

Pan-American Bus Lines Operation, 1 M.C.C. 190 (1936). 19,20

P. C. White Truck Line, Inc. v. ICC, 551 F.2d 1326 (D.C. Cir. 1977). 19

St. Johnsbury Trucking Co., Inc., Extension-Heavy Hauling, 53 M.C.C. 277 (1951). 23

Sharron Motor Lines, Inc. v. United States, 633 F.2d 1115 (5th Cir. 1981). 19

Trailways, Inc. v. ICC, 676 F.2d 1019 (5th Cir. 1981) ("*Trailways (Lincoln)*"). 8,10,11

Trailways, Inc. v. ICC, 659 F.2d 1071 (*mem.*) (3d Cir. Apr. 20, 1981) ("*Trailways (Atlantic City)*"). 8,11

Truck Transport Inc. v. ICC, 631 F.2d 1023 (D.C. Cir. 1980). 22

United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515 (1946). 21,22,23,24

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). 13,16,18,19,22

Virginia Appalachian Lumber Corp. v. ICC, 606 F.2d 1385 (D.C. Cir. 1979). 8,26

Watkins Motor Lines, Inc. v. ICC, 641 F.2d 1183 (5th Cir. 1981). 19

Statutes

Administrative Procedure Act:

5 U.S.C. §553 3,11

5 U.S.C. §706(2)(A) 3

PAGE

Interstate Commerce Act:

49 U.S.C. §10922 2,5,14

28 U.S.C. §1254(1) 2

28 U.S.C. §2342-43 5

28 U.S.C. §2350(a) 2

Miscellaneous

49 C.F.R. §1100.80, ICC Rule 80. 3,21,22

Ex Parte No. MC-133, Entry Flexibility—Regular-Route Passenger Service, 44 Fed. Reg. 64845 (Nov. 8, 1979). 5,15,21,22,24

Ex Parte No. MC-121, Policy Statement on Motor Carrier Regulation, 44 Fed. Reg. 60296 (Oct. 19, 1979). 11,12,14,15,16,17,18,19,20

Ex Parte No. MC-125, Fare Flexibility for Bus Industry, 44 Fed. Reg. 39555 (July 6, 1979). 15

Ex Parte No. MC-126, General Temporary Order No. 18, General Temporary Authority Regular-Route Passenger Operations, 44 Fed. Reg. 30810 (May 29, 1979). 15

The Intercity Bus Industry, a Preliminary Study, issued May, 1978. 15

Report of the Bus Industry Study Group. 15

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GREYHOUND LINES, INC.,

Petitioner,

v.

TRAILWAYS, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Reference to the Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit is officially reported at 673 F.2d 514 and at ___ U.S. App. D.C. ___ and is unofficially reported at 1982 Fed. Carr. Cas. ¶82,893.*

* The District of Columbia Circuit amended its opinion by order June 4, 1982. App. 24. References to the Appendix will be made as "App."

Statement of Grounds of Jurisdiction

(i) The judgment sought to be reviewed was entered on March 16, 1982. App. 1. The District of Columbia Circuit amended its opinion on June 4, 1982. App. 24.

(ii) The District of Columbia Circuit denied the petition for rehearing with suggestion for rehearing *en banc* of Greyhound Lines, Inc. on May 14, 1982, App. 25, and denied the petition for rehearing with suggestion for rehearing *en banc* of the Interstate Commerce Commission on June 4, 1982.

(iii) Not applicable.

(iv) This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. §§1254(1) and 2350(a).

STATUTES AND REGULATIONS INVOLVED

The Interstate Commerce Act, 49 U.S.C. §10922(a) (1982),* provides:

> §10922. *Certificates of motor and water common carriers*
>
> (a) Except as provided in this section and section 10930(a) of this title, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title as a motor common carrier of passengers or water common carrier, respectively, if the Commission finds that—
>
> (1) the person is fit, willing, and able—

---

* Section 10922 of the Interstate Commerce Act is set forth in full at App. 110.

> (A) to provide the transportation to be authorized by the certificate; and
>
> (B) to comply with this subtitle and regulations of the Commission; and
>
> (2) the transportation to be provided under the certificate is or will be required by the present or future public convenience and necessity.

The Administrative Procedure Act, 5 U.S.C. §706(2)(A) (1966),* provides:

> §706. *Scope of review*
>
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .

Rule 80 of the Interstate Commerce Commission's Rules of Practice, 49 C.F.R. §1100.80 (1981), provides in part:

> §1100.80. *Evidence; records in other Commission proceedings. (Rule 80)*

---

* Sections 553 and 706 of the Administrative Procedure Act are set forth in full at App. 107, 108.

> If any portion of the record before the Commission in any proceeding other than the one on hearing is offered in evidence a true copy of such portion shall be presented for the record in the form of an exhibit. . . .

STATEMENT OF THE CASE

On October 17, 1978, petitioner Greyhound Lines, Inc. ("Greyhound") filed with the Interstate Commerce Commission ("ICC") an application to remove an archaic "closed-door" restriction on its operating authority between Texarkana, Texas and Memphis, Tennessee. The restriction prohibited Greyhound, which made a rest stop in Little Rock, Arkansas, from taking on or discharging passengers there. Its removal allowed Greyhound to provide a direct, faster service between Little Rock, on the one hand, and Texarkana and Memphis, on the other, than its existing circuitous routes permitted. *See* map at App. 95. Respondent Arkansas Motor Coaches, Ltd., Inc. ("Arkansas Motor"), a wholly owned subsidiary of Trailways, Inc., also served those three points.

Respondents Trailways, Inc., its subsidiaries and affiliates (collectively "Trailways") filed with the ICC a protest to Greyhound's application and the ICC directed use of the modified procedure suitable for routine applications.

Pursuant to the ICC's modified procedure, Greyhound and Trailways submitted verified statements to Review Board 3 of the ICC. Trailways therein argued that a grant of this authority to Greyhound would have an adverse impact not only on Arkansas Motor, but also on the whole Trailways' system and all small carriers. App. 100-105. Although the statement reported Trailways' estimates of direct diversion drawn from a simplistic analysis of travel (rejected by Review Board 3) not only over Arkansas Motor's lines, but all of those of Trailways,

it contained no evidence or offer of evidence on any of Trailways' broader claims.

On February 8, 1980, Review Board 3 served its decision granting Greyhound's application. App. 34. It concluded that a grant of authority to Greyhound would not materially adversely affect Arkansas Motor or its parent, Trailways, since the likelihood of substantial diversion of Trailways' traffic was remote. App. 39-40. Moreover, it held that "[o]n balance, the benefits to the public from applicant's more expeditious service upon a grant far outweigh any detriment to existing carriers shown by this record." App. 40.

In its exceptions to the Review Board's decision, Trailways requested the ICC to take official notice of unsworn comments of counsel Trailways filed on February 7, 1980 in a proceeding regarding proposals for rulemaking, Ex Parte No. MC-133, *Entry Flexibility—Regular-Route Passenger Service* ("MC-133"). App. 77.

On June 17, 1980, a three-member panel of the ICC, Division 1, issued its opinion affirming the Review Board's decision. App. 30. Subsequently, on September 23, 1980, the ICC issued a certificate of public convenience and necessity to Greyhound which authorized it to commence the proposed service at Little Rock. That service has continued without interruption from that date.

On March 27, 1981, Trailways filed its petition for review with the District of Columbia Circuit pursuant to 28 U.S.C. §§2342-43. On March 16, 1982, the Court of Appeals reversed the order of the ICC. App. 1. It held, in substance, not only that the ICC had acted arbitrarily and capriciously by not considering, in implementing the statutory standard of "public convenience and necessity," 49 U.S.C. §10922(a), the effect an award of such authority to Greyhound might have on the whole Trailways system, but also that the ICC had "evaded" its responsibilities:

"We are aware that the 'consideration' lacking in this case and called for on remand may require an in-depth study of the competitive structure of the intercity bus market to which an adjudicatory-type proceeding may not normally be conducive. We also do not ignore the discretion commonly accorded agencies in the ordering of their own proceedings. We are simply concerned that by a combination of circumstances the ICC has been able to evade an important, even if it is also likely to be a difficult, element of a reasoned decision on Greyhound's application—the matter of assessing the structure of the bus market and determining if there is any detriment to public interest arising from the incremental impact on Trailways' competitive position of granting Greyhound an authority which, in all other respects, seems quite reasonable.

• • •

"The sum and effect of these circumstances is that the Commission, by one way or another, has evaded or otherwise missed a full consideration of the broad question of the long-term effects of incremental increases of Greyhound's market share on the greater public interest of which the ICC is statutory guardian. We find Trailways' argument to the Commission persuasive: even in a 'small' authority application, an award which eliminates a competitive edge in a carrier other than Greyhound is an effective shift of that edge to Greyhound. . . . The Commission should not allow Greyhound to grow larger without careful and detailed examination of *all* aspects of public interest, including the long-range interest in continuing competition in the market." App. 18-19. (Footnote omitted). (Emphasis in original).

It also held that the ICC erred in finding it could not properly take official notice of Trailways' MC-133 comments. App. 21-22.

Both Greyhound and the ICC filed petitions for rehearing with suggestions for rehearing *en banc*. Greyhound's petition was denied on May 14, 1982 with an attached memorandum indicating that the District of Columbia Circuit would be making changes in the principal opinion. App. 25-26. The ICC's petition and suggestion were denied on June 7, 1982, with Judges MacKinnon and Bork voting for rehearing *en banc*. App. 28, 29. On June 4, 1982, the District of Columbia Circuit amended its opinion to modify two passages which had referred to monopoly power or monopolistic position in connection with Greyhound. App. 24. On June 16, 1982, the District of Columbia Circuit granted Greyhound a thirty-day stay pending its petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Preliminary Statement

Despite this Court's condemnation of judicial intrusion into areas of agency discretion, most recently in *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), that problem persists and requires further remedial review. The record below presents a particularly striking example of the substitution by a reviewing court of its own special notions of how an administrative agency should apply its expertise and whether it may enforce compliance with its own rules.

In reversing a "small" authority grant, the District of Columbia Circuit sought to redress 45 years of regulation of the two largest bus carriers and competitive relationships in the entire intercity bus industry. In so doing, the District of Columbia Circuit has created conflicts with decisions of the

Third, Fifth and Seventh Circuits and even its own precedents, which cannot be resolved without review. Trailways has unsuccessfully made to the Third and Fifth Circuits virtually the same contentions regarding alleged competitive injury from ICC orders involving service to Lincoln, Nebraska and Atlantic City, New Jersey. *Trailways, Inc. v. ICC*, 676 F.2d 1019 (5th Cir. 1981) ("*Trailways (Lincoln)*"). App. 42. *Trailways, Inc. v. ICC*, 659 F.2d 1071 (*mem.*) (3d Cir. Apr. 20, 1981) ("*Trailways (Atlantic City)*"). Other carriers have unsuccessfully challenged the very rulemaking and policy statement regarding burden of proof which the ICC applied below, *Assure Competitive Transp., Inc. v. United States*, 635 F.2d 1301 (7th Cir. 1980) ("*Assure II*"). Finally, the decision below, in its emphasis on petitioner's size as justifying calls for radical modifications in ICC entry procedures and rules, conflicts with one of its own prior decisions criticizing the ICC for just that sort of discriminatory mode of proceeding, *Greyhound Corp. v. ICC*, 668 F.2d 1354 (D.C. Cir. 1981) and 551 F.2d 414 (D.C. Cir. 1977), which also smacks of heretofore invalidated "fitness flagging", *Virginia Appalachian Lumber Corp. v. ICC*, 606 F.2d 1385 (D.C. Cir. 1979).

The decision below has been seized upon by Trailways and other protestants seeking delay, virtual elimination of the need for them to prove unsupported contentions of injury to competition and to competitors, and a return to anticompetitive entry barriers. Thus, Trailways has recently asserted to the ICC, on the authority of the decision below, that Greyhound should not be granted authority over a route serving Fort Collins, Colorado, which Trailways had *abandoned*, *Greyhound Lines, Inc., Extension—Ft. Collins, Co.*, No. MC-1515 (Sub. No. 306) (June 10, 1982). App. 54. Another group of protesting carriers, on the basis of the decision below, sought review and moved for a stay in the District of Columbia Circuit; both the petition and motion are currently pending. *Capitol Bus Co. v. United States*, No. 82-1380 (D.C. Cir., filed April 5, 1982). The court below directed how the ICC should define and implement

a statutory standard of "public convenience and necessity," imposing on it the duty to consider broad industry conditions on the basis of mere contentions of competitive injury and to disregard the burden of proof on protestants in the special case of claims of such injury against the largest bus carrier by the second largest. It also proceeded to direct how the ICC should act upon submissions which do not conform to its own rules and standards of form, timeliness or competence. It makes novel, radical and discriminatory changes in settled agency procedures and overrides established agency rules and practices.

The immediate practical consequences for the transportation industry are significant. Successful judicial imposition of a policy of promoting one large carrier over another in route application proceedings, which the ICC has emphatically rejected, but of which the District of Columbia Circuit approves, App. 16, would have a chilling effect, and not only upon intra- and intermodal competition generally. It could also have a chilling effect upon the many smaller carriers whose applications might be denied to protect Trailways' "competitive edge" vis-a-vis petitioner. Competition from anyone, not merely Greyhound, could arguably injure Trailways, "a vulnerable competitor." App. 18, 19.

The ICC sought to lower entry barriers; this decision could be read to foster higher ones. Moreover, its reasoning could be applied to freight carriers as well, and to localities as well as nationwide. *See*, App. 19. The effort and expense of such formless, potentially limitless and protracted proceedings are disproportionate to the authority applied for. Raising such new, higher entry barriers has significance for many localities. Had Trailways petitioned the District of Columbia Circuit rather than the Third and Fifth Circuits to review the ICC grants of Greyhound authority to serve Atlantic City, New Jersey, and Lincoln, Nebraska, respectively, residents of and visitors to those areas would not now enjoy more competitive

bus service. In view of the decision below, the plans of the ICC for a more competitive, more responsive, more fuel efficient intercity bus industry, subject to fewer outdated and uneconomic restrictions, could remain an incompletely realized concept.

I. THE DISTRICT OF COLUMBIA CIRCUIT IS IN CONFLICT WITH THE OTHER CIRCUITS

The decision below is directly in conflict with prior decisions of other circuits and of itself as to essential parts of its rationale. The most striking conflict is with a decision of the Fifth Circuit, *Trailways (Lincoln), supra.*

Trailways had made the same contentions to the ICC in a proceeding to remove a "closed door" restriction on Greyhound service to Lincoln, Nebraska similar to the one involved at Little Rock. The inadequate effort to show harm was of the same type. App. 44-45.* The ICC briefly disposed of Trailways' contentions and granted the authority; the Fifth Circuit analyzed how little Trailways had shown, as well as how much it had contended—as the District of Columbia Circuit did not—and affirmed. App. 45; *compare*, App. 16.** Implicit in the Fifth Circuit's decision is the proposition that a protestant's unsupported contentions are insufficient, both generally and under the ICC's rule on the burden of proof, to justify denial

---

* The essential similarity of the two proceedings was recognized by the ICC, as was the inappropriateness of any broad study in either. *See* order consolidating four other proceedings. App. 51.

** When Division 1 of the ICC stated, "[o]therwise, petitioner's representations concerning potential systemwide harm may not be considered. . .," it referred to those representations made to it, and not to those earlier ones which did not persuade Review Board 3. App. 32. Division 1 had already discussed the record before Review Board 3 before turning to Trailways' contention that supplementary materials regarding allegedly greater diversion of revenue would substantially change the result reached by Review Board 3. Only then did Division 1 make the observation which was the critical element in the reasoning of the court below. App. 9-12. Review Board 3 had in fact considered the alleged evidence of diversion of revenue regarding both Arkansas Motor *and* Trailways and had found it wanting. App. 39-40.

of an application in other respects reasonable, or the raising of the entry barrier of protracted proceedings and "in-depth studies." The District of Columbia Circuit is alone in that novel view.

The District of Columbia Circuit's decision is also in conflict with that of the Third Circuit in *Trailways (Atlantic City), supra.* There, a memorandum decision dismissed Trailways' petition for review of an ICC order which permitted Greyhound, as well as Trailways and other carriers, to serve Atlantic City, New Jersey, despite unsupported contentions by Trailways of competitive injury nationwide from enhanced competition there. Obviously, most circuit courts require the ICC to consider evidence rather than mere assertions.

Other circuits have accepted implicitly the ICC's allocation of the burden of proof to protestants which the District of Columbia Circuit explicitly rejects. The latter rejects the ICC's requirement that a protestant show injury to the public from injury to it in order to defeat an application for authority otherwise in the public interest. The District of Columbia Circuit's reasoning is that the ICC based its burden of proof rule on a mere assumption that the rule is pro-competitive in all cases, while the reviewing court, persuaded by Trailways' argument, presumes it knows better. App. 15.

In so doing, however, the District of Columbia Circuit fails to defer sufficiently to the ICC's rulemaking authority, 5 U.S.C. §553, App. 107-108, and to the application of its expertise to the extensive comment it received in Ex Parte No. MC-121, *Policy Statement on Motor Carrier Regulation,* 44 Fed. Reg. 60296 (Oct. 19, 1979) ("MC-121"). App. 59. That position is in direct and irreconcilable conflict with that of the Seventh Circuit in *Assure II.*

The approach of the Seventh Circuit in *Assure II,* or, for that matter, of the Third and Fifth Circuits in *Trailways (Atlantic City)* and *Trailways (Lincoln), supra,* is surely closer

to that approved by this Court than is that of the District of Columbia Circuit, *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), while the decision below is in conflict with those of the other circuits.

There is also a rather surprising internal conflict at the District of Columbia Circuit. In *Greyhound v. ICC*, *supra*, the District of Columbia Circuit strongly disapproved of the ICC's earlier efforts to treat petitioner (and its parent) differently than Trailways (and its various parents) for purposes of securities regulation. The only serious ground for such disparate treatment of Greyhound was its large size in the bus industry. Not only are these District of Columbia Circuit panel decisions self-contradictory, they violate basic principles of consistency and serve to confuse the ICC. In its petition for rehearing below, the ICC unsuccessfully sought reconciliation of these decisions and clarification of its responsibilities toward Greyhound and Trailways.

These conflicts between the District of Columbia Circuit decision below and other decisions of that circuit and of other circuits require the unifying and reconciling review which only this Court can provide. The matter is not merely of moment to Greyhound and Trailways alone; on the contrary, the decision below threatens to revive the questions about the rationality of the MC-121 policy statement which the ICC and the carriers it regulates have considered settled by the Seventh Circuit in *Assure II*.

II. THE DISTRICT OF COLUMBIA CIRCUIT HAS EXCEEDED THE BOUNDS OF PROPER JUDICIAL REVIEW AND HAS INTRUDED INTO AREAS PROPERLY COMMITTED TO AGENCY DISCRETION REGARDING COMPETITION, POLICY AND PROCEDURE

In its decision, the District of Columbia Circuit intruded into a number of areas committed to agency discretion. The first, and most sensitive area, involves the choice of means agencies (and not the courts) use to implement Congressional policy regarding competition. The second area involves agency direction of its own procedure.

A. THE DISTRICT OF COLUMBIA CIRCUIT HAS INTRUDED INTO THE IMPLEMENTATION OF POLICY BY REGARDING MERE CLAIMS OF COMPETITIVE INJURY AS IMPOSING NEW DUTIES ON THE ICC

The District of Columbia Circuit has, without a proper basis, intruded into the ICC's implementation of policy by barring its grant of route authority for the lack of a bus industry study sought by respondents on the assumption or finding that such a study had been "evaded" by the ICC, implying a duty to make one on the basis of mere allegations of respondents. It has thereby ignored and attempted to alter the balance between courts and agencies previously struck by this Court in *WNCN, supra*, and in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).* The court below may believe that a route application by the larger of the two largest bus carriers (both small in terms of the intermodal competition they both face)

---

* The District of Columbia did not cite either case, in contrast with its careful distinguishing of *Vermont Yankee* in footnote 58 in *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979). The decision below raises questions whether the District of Columbia Circuit currently regards *Vermont Yankee* and *WNCN* as having application beyond their facts, or beyond the particular agencies involved.

protested by the smaller of them should trigger novel responses from the ICC. Taking judicial notice of economic conditions and history, and presuming to judge of matters properly left to those with expertise, it may believe in the necessity of elaborate consideration of the competitive balance between them, of industry structure and, especially, of claims by one of unevidenced and inadequately explained systemwide effects or of competitive vulnerability which did not convince the ICC. It may not, however, act on such beliefs, except at the risk of invading areas of agency discretion.

The ICC is charged with the responsibility of issuing certificates of authority, employing the "public convenience and necessity" standard of the Motor Carrier Act, 49 U.S.C. 10922(a). Congress has delegated it considerable discretion in the choice of means in carrying out that responsibility. One of those means has of late been through modified proceedings in which the showings required of applicant and protestant, respectively, are those set forth in MC-121.* "In-depth studies" of the structure of the industry in a "small" route authority proceeding are not among the means chosen by the ICC. That is so, whether or not Greyhound is the applicant. The choice among such means should remain where Congress placed it, with the ICC and not the courts.

The District of Columbia Circuit, however, in attempting to justify its intrusive reversal of the ICC's order and its "Instructions on Remand", asserted that the ICC has "evaded" its responsibility to assess the competitive balance between Greyhound and Trailways and the effect of a possible shift therein before granting Greyhound even a minor additional authority. The District of Columbia Circuit is seriously misinformed. Even if the ICC had never chosen to address such matters, the

---

* The use, as in the Little Rock proceeding, of modified proceeding, involving written submissions only, under ICC practice is appropriate for relatively minor, routine applications. Significantly, Trailways did not seek administrative review of the ICC decision to use it in this instance.

case for judicial intervention would be insufficient. As, however, the ICC has not "evaded" any of its responsibilities, reversal and such a remand are especially improper.

Prior to the petition for judicial review, the ICC issued a December 15, 1980 legislative statement, to which several rulemaking proceedings, studies and open conferences had given rise. Many of these dealt with market structure, industry development, recommendations for easing regulations, relaxation of barriers to entry—temporary and permanent and fare flexibility: (1) *The Intercity Bus Industry, a Preliminary Study*, issued May, 1978; (2) *Report of the Bus Industry Study Group;* (3) Ex Parte No. MC-125, *Fare Flexibility for Bus Industry;* (4) Ex Parte No. MC-126, General Temporary Order No. 18, *General Temporary Authority, Regular-Route Passenger Operations;* (5) Ex Parte No. MC-121, *Policy Statement on Motor Carrier Regulation;* and (6) Ex Parte No. MC-133, *Entry Flexibility—Regular-Route Passenger Service.* App. 83, 88-89

The ICC, in the entry portion of its accompanying Section by Section Analysis, explained that it had considered, but had rejected the suggestion it discourage, or use more stringent procedures and tests for, Greyhound applications:

> "Another approach which has been suggested would be to curtail the ability of the largest carrier, Greyhound, from gaining new authority while other carriers have an opportunity to gain larger shares of the total market under the liberalized entry provisions of new legislation. [The infamous "two tier approach".] Such an approach, it is argued, is necessary to reduce Greyhound's market share of bus traffic nationally under a system of reduced regulation. We do not favor that approach for several reasons. First . . . such an approach . . . is inconsistent with a policy based on competition. Second, it reflects a 'blunt instrument' approach to a variety of different market situations, including . . . those where other carriers

have effective monopolies in certain markets.***" App. 90, 92.

That clearly articulated assessment explained not only why the ICC would not recommend the "two tier approach" to Congress, but also would not apply it in the administration of the Motor Carrier Act, including in the instant Little Rock proceeding. That assessment was made in the setting in which the "broad legislative evidence" of which the District of Columbia Circuit speaks had its proper place. When the ICC uses in adjudicatory proceedings procedures designed to protect the integrity of the record being made, such "evidence" has no necessary place. By assuming, from the adjudicatory record before it below, that the ICC had failed ever to consider such matters as a "two tier approach", the District of Columbia Circuit was led into serious error.

B. THE DISTRICT OF COLUMBIA CIRCUIT HAS IMPROPERLY ATTEMPTED TO REVERSE OR REVISE ICC POLICY CHOICES AS TO WHAT IS PRO-COMPETITIVE

The District of Columbia Circuit based its reversal of the ICC upon grounds of arbitrary and capricious action rather than lack of substantial evidence. Such grounds are inappropriately relied upon when the reviewing court's quarrel is less with the particular agency action than with the policy it embodies.

In carrying out its responsibilities, the ICC in MC-121 allocated to protestants the burden of proving that the public interest would be harmed by injury to protestants. Since protestants had an economic interest in proving such injury, the ICC's choice of that means was both rational and flexible. Its choice withstood challenge in *Assure II*. This Court has approved the use of general rules, findings and policy statements to assist in resolving particular matters in the face of dissatisfaction with their use by the District of Columbia Circuit, *WNCN, Vermont Yankee, supra.*

Trailways could, under the MC-121 method, have tried to prove its contentions instead of merely making them. But the court below appears to have concluded that, notwithstanding Trailways' failure to make a record, the ICC should have taken into consideration the impact a grant of this authority to Greyhound would have on "a market structure of which [it] should be expertly aware and which Trailways should therefore not be bound to 'prove' before using it as a basis for its argument." App. 15-16. By ignoring that burden on Trailways, the District of Columbia Circuit undermined the ICC administration of the Motor Carrier Act, including MC-121, all on behalf of a single carrier, Trailways, an alleged "vulnerable competitor." The District of Columbia Circuit's reasoning was unconvincing, and intimates a contrary policy choice on its part:

> "The Commission itself has adopted a policy that competition is to be given more weight and less emphasis is to be placed on protecting existing carriers in evaluating applications for operating authority. The *assumption* underlying this increase in the protestant's burden, however, clearly is that an application for new or expanded route authority is generally *pro*-competitive. This may be so in the great majority of cases, but not necessarily in all. The Commission should not become so enamored of procedural rules regarding burden of proof that it overlooks its perceived mission to preserve competition overall and its ultimate duty to protect the public interest." App. 15. (Emphasis in original). (Footnote omitted).

When the District of Columbia Circuit, at Trailways' request, nullified that choice in this case, it engaged not merely in judicial legislation, but in special legislation. The ICC's allocation of the burden of proof was an informed policy choice within an area committed to ICC discretion.

Worse yet, the District of Columbia Circuit has lent judicial

weight to a "two-tier approach" for a route application, with petitioner alone in the disfavored tier. Carried to its extreme, the logic of the "persuasive" argument of Trailways, that "an award which eliminates a competitive edge in a carrier other than Greyhound is an effective shift of that edge to Greyhound," could lead the ICC to engage in more elaborate consideration not only where Trailways, or any other carrier, protests a Greyhound application, but also where Trailways, a "vulnerable competitor," protests the application of any carrier wishing to compete with it. App. 18-19.

The thesis of the Court of Appeals, that the ICC's application to Trailways' contentions of the MC-121 burden of proof was "arbitrary and capricious" can only be supported if the ICC's MC-121 policy were arbitrary and capricious, in whole or in part. Such a conclusion would, however, conflict with a prior decision of the Seventh Circuit, *Assure II*.

As both *WNCN* and this case demonstrate, the District of Columbia Circuit has strong reservations about agencies using in adjudicatory proceedings any of the determinations or policies they may have reached in rulemaking or other non-adjudicatory proceedings. In that sense, the decision below is consistent not only with that reversed by this Court in *WNCN*, *supra*, but also with the decision of the Court of Appeals reversed in *Vermont Yankee*, *supra*. In all three, the District of Columbia Circuit intervened both to prevent agencies from developing policies or findings as to matters common to their authority proceedings and to broaden the scope of such proceedings to deal with such matters on a case-by-case basis.

In this instance, however, it has acted inconsistently even in terms of its own position; it has proposed an "in-depth study of . . . competitive structure . . . to which an adjudicatory-type proceeding may not normally be conducive." The District of Columbia Circuit has thereby countenanced the stretching of this "small", "closed-door" restriction proceeding to even grosser dimensions than it sought to expand radio license

transfer or renewal proceedings (in order to accommodate format change reviews, *WNCN, supra*) or nuclear power plant license proceedings (to accommodate waste disposal issues, *Vermont Yankee, supra*). In so doing, it has in effect asked the ICC to consider once again issues adequately addressed before in other ways, in MC-121, presumably in the expectation of a different, more "pro-competitive" result.

C. THE DISTRICT OF COLUMBIA CIRCUIT ENGAGED IN INAPPROPRIATE JUDICIAL REVIVAL OF SUPERSEDED ICC POLICIES AS TO BURDEN OF PROOF THAT LIMITED ENTRY AND RESTRICTED COMPETITION

In its decision below, the District of Columbia Circuit improperly intruded upon the policymaking function of the ICC by attempting to rehabilitate and use to justify its decision the superseded policies. Revival of such policies, if they are to be revived, is, however, a matter exclusively for the ICC.

Shortly after the Act became effective in 1935, the ICC developed a three-part test for route application proceedings, *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936). Forty years later it was criticized as stifling competition, by, among others, the District of Columbia Circuit itself, *P. C. White Truck Line, Inc. v. ICC*, 551 F.2d 1326 (D.C. Cir. 1977). *See also Watkins Motor Lines, Inc. v. ICC*, 641 F.2d 1183 (5th Cir. 1981); *Sharron Motor Lines, Inc. v. U.S.*, 633 F.2d 1115 (5th Cir. 1981); *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981) (*"Assure I"*); *May Trucking Co. v. United States*, 593 F.2d 1349 (D.C. Cir. 1979). The result of these criticisms was the MC-121 proceeding.

In MC-121, the ICC concluded that, because the nature of the motor carrier industry had changed dramatically since the Motor Carrier Act of 1935 and *Pan-American*, it was appropriate to place upon the protestant the responsibility for

developing the record and producing the evidence as to whether the public demand or need could or would be served as well by existing carriers. The ICC expressly overruled the second part of the *Pan-American* test, which required applicant to show inadequacy of existing service, and defined a new test. Such a redefinition of "public convenience and necessity" by the ICC was a matter committed to its judgment and discretion and as entitled to as much respect as was the original *Pan-American* test in 1936. Although the District of Columbia Circuit recognized that MC-121 had reallocated and redefined the burden of proof as to harm, footnote 48 and accompanying text, App. 15, it discussed the second part of the *Pan-American* test as if MC-121 had not overruled it. App. 7-8. The District of Columbia Circuit's reservations about that rule, as a rule, is no basis on which to undo the ICC's choice.

Nor is a contrary result compelled by *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953), cited at App. 7-8, or by *Assure I*. *Assure I* permitted the ICC to evaluate the totality of factors, rather than be bound to the elements of the outdated *Pan-American* test, which it would soon reject formally. *Assure I* is hardly precedent for requiring of the ICC a study of market structure, when the respondents, the parties making claims of injury, should have at least attempted to prove them.

What the Court of Appeals has attempted is judicial legislation, pure and simple. It is also judicial legislation at its least defensible, because, as has been seen above, the Court of Appeals is acting, not in the face of agency evasion, neglect or inaction, as it asserts in justification, but on the contrary, in the face of consistent, purposeful agency action. That the Court of Appeals may not, in this instance, accept the agency's economic rationale is no basis for judicial intervention.

D. THE DISTRICT OF COLUMBIA CIRCUIT IMPROPERLY INTRUDED INTO AGENCY PROCEDURE

1. Reversal for Agency Refusal to Accept Submissions Not in Accordance with Its Rules Was Unjustified

The District of Columbia Circuit has reversed the ICC's decision that certain unsworn arguments of counsel were not matters of which official notice could be taken, at least not in an adjudicatory authority proceeding. It cited in support *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946). The decision below is not merely in error; aided by the seeming authority of this Court, it may seriously stifle the efforts of administrative agencies, by judicious self-limitation, to ensure the receipt of only reliable evidence in proceedings which adjudicate important interests both of the public and of private parties. Whether the discretion of agencies to control their procedure, especially when they seek to impose institutional limits on the evidence they will hear in different types of proceedings, should be protected, enhanced or reduced is a significant issue. The District of Columbia Circuit, which is in effect directing that at least some adjudicatory proceedings be opened to the receipt of "broad legislative-type evidence," has sought to reduce that discretion, and has used a prior decision of this Court for that purpose. Only through review of this matter can the Court assure that its prior rulings are being correctly understood and applied in a case of considerable moment.

In this instance, the ICC rejected a submission offered to it by respondents after the initial Review Board 3 decision. The submission, of which respondents sought official notice, consisted of 157 pages of comments signed by respondents' counsel. These had been submitted in a "legislative-type" proceeding, Ex Parte No. MC-133, *Entry Flexibility—Regular-Route Passenger Service* ("MC-133"). App. 77. The submission did not comply with ICC Rule 80, 49 CFR §1100.80, and was unsworn. The ICC also declined to take official notice of these "com-

ments" as part of the record in another proceeding MC-133, as they were not ICC findings or decisions). The District of Columbia Circuit was, accordingly, in error when it reversed such refusal to take notice. App. 21-22.

The ICC treated the proffer as material subject to objections founded upon its Rule 80 as well as upon *Coastal Tank Lines, Inc., Extension—Neal, W. Va.*, 108 M.C.C. 190 (1968); it could and did reject it on both grounds. ICC rejection of submissions for failure to comply with its rules is proper. *Truck Transport Inc. v. ICC*, 631 F.2d 1023, 1027 (D.C. Cir. 1980). *See also Howard Sober, Inc., Extension—Secondary Truckaway Minnesota*, 88 M.C.C. 755, 758 (1962); *Howard H. Krapf Extension—Cinders*, 76 M.C.C. 103, 105 (1958).

Moreover, "[a]bsent constitutional constraints or extremely compelling circumstances the 'administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' " *FCC v. Schreiber*,, 381 U.S., at 290, quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S., at 143." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-44 (1978). Clearly, the ICC's refusal to take official notice of Trailways' MC-133 comments does not violate the Constitution. Likewise, Trailways' initial decision not to seek leave to submit its MC-133 comments to Review Board 3 level (comments and decisions were served within a day of each other) and failure to comply with ICC Rule 80 hardly places it in a position to assert "extremely compelling circumstances."

On the issue of taking notice, *Pierce, supra*, does not compel the result reached by the District of Columbia Circuit; on the contrary, it demonstrates the error of the decision below. In *Pierce* both proceedings were route applications, adjudicatory in nature, and covered the same route. The parties conducted them one after the one in the same place, could confront one another's witnesses (who were sworn) and stipulated to incorporation by reference of each record into the other. Only the composition of the joint boards hearing them was different;

both were decided by the ICC in a single report. On review, the district court vacated the order partially on the ground that the ICC improperly treated the two applications as consolidated by considering evidence presented in one application in deciding the other one. This Court, however, held that the Commission's treatment of the evidence was not improper because it did not result in substantial prejudice to the protestants.

A decision, such as the one below, in which virtually none of the elements in *Pierce* are present, is not compelled by *Pierce* to require notice of material such as respondents' MC-133 comments. Such a decision actually violates the spirit of *Pierce*, in which avoidance of prejudice and of judicial interference with an agency are as much a part as the permission to take notice.

The ICC appears to have the better reading of *Pierce*, and its interpretation should receive review and support from this Court. In *St. Johnsbury Trucking Co., Inc., Extension—Heavy Hauling*, 53 M.C.C. 277 (1951), the party requesting official notice charged the ICC with general knowledge of certain practices of general-commodity carriers and attached a copy of a pending ICC investigation (Ex Parte No. MC-45) concerning the topic. The ICC distinguished *Pierce* and held that it lacked the power to take official notice:

> "Our power to take official notice does not extend to records in other proceedings. In *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, cited by the parties, we had under consideration two separate applications which were closely related territorially and otherwise and these two applications were disposed of originally in a single report. Ex Parte No. MC-45 has not yet progressed to the stage of submission to the Commission and while the record in that proceeding may contain detailed evidence regarding the practices of the general-commodity carriers the circumstances of the two proceedings

> differ materially from the proceedings involved in the *Pierce* case. Accordingly the conference request in this respect will be denied." 53 M.C.C. at 289.

In the present case, MC-133 was an informal rulemaking proceeding in which no oral hearing was contemplated. 44 Fed. Reg. at 64846. App. 81. Nor were Trailways' comments "evidence," and petitioner was afforded no right of cross-examination. The ICC's decision was entirely proper and not reversible error.

2. The District of Columbia Circuit, in its Instructions on Remand, Intruded into Areas of Agency Discretion as to Control of Its Procedures

The District of Columbia Circuit in its instructions on remand, App. 18-22, intimates it is prepared to go far beyond requiring the reconsideration by the ICC of respondents' claims that the opening by petitioner of its doors to receive and discharge passengers in Little Rock (a point it already served by more circuitous means) would harm competition. In fact, the remand does not merely urge or even require the ICC now to consider matters the respondents were afforded an opportunity to prove but failed to prove the first time. These instructions are actually so intrusive and complex that they have the potential for confusing and distorting ICC route application procedures for years.

The District of Columbia Circuit appears to recognize how intrusive its instructions appear, for lip service is paid to "the discretion commonly accorded agencies in the ordering of their own proceedings." App. 18. The instructions, however, contain references to the ICC's allegedly having "evaded" one or more duties and to the "breadth of what on remand should be a careful examination of market structure and impact," App. 20, which hardly disguises the wish of the District of Columbia Circuit that its views be given the same attention as if they were commands. The opinion below presents a picture of a

court seeking to do by indirection what it implicitly realizes it cannot do openly.

The instructions the District of Columbia Circuit offers the ICC include "an in-depth study of the competitive structure of the intercity bus market to which an adjudicatory-type proceeding may not normally be conducive." App. 18.*

Finally, if the ICC were to do all that the decision below includes as "instructions", petitioner's applications would effectively be "flagged," or placed in suspense until conclusion of the "in-depth study of the competitive structure." The District of Columbia Circuit may wish that its "instructions" be so read:

> "[E]ven in a 'small' authority application . . . [t]he Commission should not allow Greyhound to grow larger without careful and detailed examination of *all* aspects of public interest, including the long-range interest in continuing competition in the market." (Emphasis in original).
>
> * * *
>
> "We normally would be reluctant to direct the Commission to take up this issue in any particular proceeding. However, when after several years the issue of an anticompetitive systemwide impact, vital to reasoned decisions in individual certification proceedings involving both Greyhound and Trailways, remains unaddressed, it is time that it be considered

* The District of Columbia Court obviously would have reconsideration on remand serve as a substitute for the hearing in a consolidated proceeding involving four non-closed door route applications, a proceeding which threatened to become so unwieldy, wasteful, potentially time-consuming and uneconomic that it was abandoned by Greyhound. It does not seem to recognize the severity of the entry barrier the consolidated proceeding created, nor does it realize that respondents never sought review of the ICC order terminating the consolidated proceeding or the one which severed Little Rock from it.

> in at least some proceeding. We hold here only that the Commission may no longer fail to consider this issue and still engage in reasoned decisionmaking." App. 19-20.

The Court of Appeals has so far intruded into the procedure of the ICC as to invite the very "flagging" practice it and other circuits have previously disapproved, when done on the ICC's own initiative, pending the outcome of other hearings relating to alleged transgressions arguable touching on fitness ("fitness flagging"). *Virginia Appalachian Lumber Corp. v. ICC*, 606 F.2d 1385 (D.C. Cir. 1979), *Ligon Specialized Hauler, Inc. v. ICC*, 587 F.2d 304 (6th Cir. 1978); *North American Van Lines, Inc. v. United States*, 412 F.Supp. 782 (N.D.Ind. 1976). While the ICC may not on its own deny applicants their right, under statute, to a reasonably expeditious and inexpensive disposition of their applications for authority, the decision below would effect the same result.

CONCLUSION

This case raises substantial issues of federal administrative law and procedure and of discrimination among common carriers of passengers, as well as conflicts between the circuits, directly and by implication, which the Court should resolve. The petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should therefore be granted.

Dated: New York, New York
July 15, 1982

Respectfully submitted,

ROBERT EHRENBARD
Counsel for Petitioner
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 463-8333

Of Counsel:
KELLEY DRYE & WARREN
WILLIAM C. BURT
MICHAEL A. BUTTERWORTH
ANDREW H. BART
RICHARD S. ORDER